

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application for Leave to Appeal under Section 5C of the High Court of the Provinces (Special Provision) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

SC APPEAL No. 199/12

SC.HC.CALA No. 178/2012

WP/HCCA/MT/31/2011/LA

DC Nugegoda No. 284/2010/L

Mahawattage Dona Chanika
Diluni Abeyratne,
No. 227/2,
Stanley Thilakaratne Mawatha,
Nugegoda.

Plaintiff

Vs.

1. Janaka R. Goonewardene,
No.17, 1st Lane,
Kirillapone,
Colombo 05.
2. Jaykay Marketing
Services(Pvt)Ltd,
Registered office
No. 130, Glennie Street,
Colombo 02.

Place of business

Keels Super Supermarket,
No.225,
Stanley Thilakaratne Mawatha,
Nugegoda.

Defendants

AND BETWEEN

Jaykay Marketing Services (Pvt) Ltd,
No. 130, Glennie Street,
Colombo 02.

Carrying on business at:

Keels Supermarket,
No. 225, Stanley Thilakaratne Mawatha,
Nugegoda.

2nd Defendant-Petitioner

Vs.

1. M.D.C.D. Abeyratne,
No.227/2,
Stanley Thilakaratne Mawatha,
Nugegoda.

Plaintiff-Respondent

2. J.R. Goonewardene,

No.17, 1st Street,
Colombo 05.

1st Defendant- Respondent

AND NOW BETWEEN

Mahawattage Dona Chanika Diluni
Abeyratne,

No. 227/2,

Stanley Thilakaratne Mawatha,

Nugegoda.

Plaintiff-Respondent-Petitioner

Vs.

Jaykay Marketing

Services (Pvt) Ltd,

No. 130, Glennie Street,

Colombo 02.

Carrying on business at:

Keels Supermarket,

No. 225, Stanley Thilakaratne Mawatha,

Nugegoda.

2nd Defendant-Petitioner-Respondent

J.R. Goonewardene,

No.17, 1st Street,
Colombo 05.

1st Defendant- Respondent-Respondent

Before : Sisira J De Abrew J
Anil Gooneratne J &
KT Chitrasiri J

Counsel : Manohara de Silva President's Counsel
for the Plaintiff-Respondent-Appellant
Neranjana de Silva for the 1st Defendant-Petitioner-Respondent
Suren Fernando 2nd for the 2nd Defendant-Petitioner-Respondent

Written submissions

Tendered on : 20.6.2013 by the Plaintiff-Respondent-Appellant
7.2.2013 by the 1st Defendant-Petitioner-Respondent
6.2.2013 by the 2nd Defendant-Petitioner-Respondent

Argued on : 11.11.2016

Decided on : 15.2.2017

Sisira J De Abrew J.

The Plaintiff-Respondent-Petitioner (hereinafter referred to as the Plaintiff-Petitioner) filed action bearing No.284/2010/L in the District Court of Nugegoda against the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Defendant-Respondent) and the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Defendant-Respondent) to restrain them (the Defendants, their servants, agents, licensees and customers) from obstructing her access road (Lot No.G of plan No.218 dated 11.7.1993 prepared by Licensed Surveyor JMW Samaranayake) and to restrain the 2nd Defendant-Respondent from disposing of waste on to her access which is morefully described in the 2nd

schedule to the plaint. The learned District Judge by her order dated 21.7.2011 granted an interim injunction as prayed for by the Plaintiff-Petitioner. Being aggrieved by the said order, the 2nd Defendant-Respondent filed an appeal in the High Court of the Civil Appeal (hereinafter referred to as the High Court) and the High Court by its order dated 27.3.2012 vacated the said order of the learned District Judge.

Being aggrieved by the said order of the High Court, the Plaintiff-Petitioner has appealed to this court. This court by its order dated 14.11.2012, granted leave to appeal on the questions of law set out in paragraph 11(a) to 11(l) of the petition of appeal dated 8.5.2012 which are set out below.

- a. Is the `said order contrary to law and against the weight of evidence?
- b. Did the High Court err and come to a wrong conclusion that in order to grant relief by way of an injunctive relief that there must be an imminent threat of danger to life, where its stated “ that the Plaintiff has failed to establish the fact that there is a threat or imminent danger to her life if such injunction is not issued”?
- c. Did the High Court fail to consider the facts on a balance of convenience and equitable consideration which has to be considered in a matter of granting and/or vacating an order for an interim injunction?
- d. Did the High Court fail to properly consider the Petitioner’s case?
- e. Did the High Court misdirect itself by holding that the Petitioner is guilty of laches?
- f. Did the High Court misdirect itself by stating that the Petitioner has not disclosed a cause of action,

- g. Did the High Court misdirect itself in appeal by setting aside the order of the District Court without identifying any error of fact or law in the order of the District Court?
- h. Can the High Court set aside the order for an interim injunction on laches when there is no error of fact or law?
- i. Was the High Court correct in disturbing the findings of the District Court without identifying any error of fact or law?
- j. Did the High Court err by failing to consider Petitioner's case of obstruction to her sole roadway access?
- k. Did the High Court misdirect itself in failing to consider the Petitioner's right of unfettered access to her residence?
- l. Did the High Court fail to appreciate the irreparable loss and damage caused to the Petitioner's health by the unsanitary waste disposal methods of the 2nd Defendant that has created an unsanitary environment to the Petitioner by the actions of the Defendants?

The learned judges of the High Court in vacating the interim injunction made the following observation.

“In the above exposition it is abundantly clear that the Plaintiff has failed to establish the fact that there is threat or imminent danger to her life if such injunction is not issued. It is an essential requirement of the proof of such fact and a vital limb of a sequential test applicable to the issuance of an interim injunction.”

When considering the correctness of the above observation made by the learned High court Judges, I would like to consider Section 54 of the Judicature Act which reads as follows.

- (1) *Where in any action instituted in a High Court, District Court or a Small Claims Court, it appears -*
 - (a) *from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or*
 - (b) *that the defendant during the tendency of the action is doing or committing or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiffs rights in respect of the subject-matter of the action and tending to render the judgment ineffectual, or*
 - (c) *that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff, the Court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, grant an injunction restraining any such defendant from-*
 - (i) *committing or continuing any such act or nuisance;*
 - (ii) *doing or committing any such act or nuisance;*
 - (iii) *removing or disposing of such property.*
- (2) *For the purposes of this section, any defendant who shall have by his answer set up any claim in reconvention and shall thereupon demand an affirmative judgment against the plaintiff shall be deemed a plaintiff, and shall have the same right to an injunction as he would have in an action brought by him against the plaintiff for the cause of action stated in the claim in reconvention, and the plaintiff shall be deemed the defendant and the claim in reconvention the plaint.*
- (3) *Such injunctions may be granted at any time after the commencement of the action and before final judgment after notice to the defendant, where the*

object of granting an injunction will be defeated by delay, the court may enjoin the defendant until the hearing and decision of the application for an injunction but for periods not exceeding fourteen days at a time.”

In *Felix Dias Bandaranayake Vs The State Film Corporation* [1981] 2SLR 287 Justice Soza considering the question whether or not an injunction should be granted held as follows:

“In deciding whether or not to grant an interim injunction the following sequential tests should be applied:

- 1. Has the plaintiff made out a strong prima facie case of infringement or imminent infringement of a legal right to which he has title, that is, that there is a serious question to be tried in relation to his legal rights and that the probabilities are that he will win.*
- 2. In whose favour is the balance of convenience- the main factor being the uncompensatable disadvantage or irreparable damage to either party?*
- 3. As the injunction is an equitable relief granted in the discretion of the Court do the conduct and dealings of the parties justify grant of the injunction. The material on which the Court should act as the affidavits supplied by plaintiff and defendant. Oral evidence can be led only of consent or upon acquiescence.*

In *Subramaniam Vs Shabdeen* [1984] 1 SLR 48 Justice Thambiah in considering the question whether or not an injunction should be granted held as follows:

- 1. The person who seeks an interim injunction must show Court that there is a serious matter to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. In other words, he must establish a prima facie case. He must first show the prima facie existence of a legal right and that there was an infringement or invasion of that legal right.*
- 2. The plaintiff must show that irreparable injury will be caused to him if the injunction is not granted. Where damages are an adequate remedy, no*

injunction will lie. The test to be applied is, "is it just that the plaintiff should be confined to his remedy in damages?"

3. *The balance of convenience should favour the grant of the interim injunction and here the test is "how does the injury that the defendant will suffer if the injunction is granted and he ultimately comes out victorious weigh against the injury which the plaintiff will suffer if the injunction is refused and he wins?" Where any doubt exists as to the plaintiff's right or if his right is not disputed but its violation is denied the court will take into consideration the balance of convenience. If the plaintiff establishes his right and its infringement the balance of convenience need not be considered.*

The plaintiff had established a strong prima facie case to his entitlement to carry on the business and the violation of his rights. It would not be just to confine the plaintiff to his remedy in damages. An interim injunction must be granted to stop the wrong doer from obtaining the benefits arising from his own wrongful conduct. The application to dissolve the injunction therefore could not succeed. "

When I consider the above legal literature I am unable to agree with the above observation made by the learned High Court Judges. Learned counsel appearing for the 2nd Defendant-Respondent however submitted that the word life should be replaced with the word 'right'.

Has the Plaintiff-Petitioner established a prima facie case? Has the Plaintiff-Petitioner, prima facie, shown an existence of a legal right and that there was an infringement or invasion of that legal right? If the Plaintiff-Petitioner has not established the above rights, she will not be entitled to an interim injunction. I now advert to the above questions. What is the Plaintiff-Petitioner's case? The Plaintiff-Petitioner states, in her affidavit filed in the District Court that the 2nd Defendant-Respondent is running a Super Market; that her access road is blocked by the vehicles of customers coming to the said Super Market, by the vehicles of suppliers bringing goods to the said Super Market, and by the vehicles of the 2nd Defendant-Respondent; that due to the said obstruction of her access road, she can't, on certain days, walk on the said road; that the 2nd Defendant-Respondent dumps animal waste from the said Super Market on the access road of the Plaintiff-

Petitioner and on the strip of land in front of her house; and that said animal waste emits an unbearable stench causing health hazard to her and the neighbourhood. The Plaintiff-Petitioner, by a letter dated 19.8.2009, has informed the Municipal Council, Kotte about the said health hazard and also complained to the police about the obstruction of the road. She has made complaints to the police on 3.12.20017, 13.5.2009 and 22.7.2009. She has annexed the copies of the said complaints and the letter written to the Municipal Council, Kotte. The Defendant-Respondents have denied the above allegations. However it is an undisputed fact that the 2nd Defendant-Respondent is running a Super Market by the side of the access road of the Plaintiff-Petitioner. The 2nd Defendant-Respondent, in his affidavit filed in the District Court, states that he, in a lawful manner, disposes of the waste of the Super Market with the help of private contractors. It is clear from the facts of this case and the plan No.218 referred to above that the road leading to the house of the Plaintiff-Petitioner is situated between the house of the Plaintiff-Petitioner and the Super Market of the 2nd Defendant-Respondent. The Plaintiff-Petitioner should have free access to her house through road leading to her house from the main road. This is her legal right. No one can cause obstruction to the said right.

When I consider the above facts, I hold that the Plaintiff-Petitioner has established a prima facie case and that he has, prima facie, shown an existence of a legal right and that there is an infringement and/or invasion of the said legal right.

In whose favour the balance of convenience – the main factor being the uncompensatable disadvantage or irreparable damage to the either party. Has the Plaintiff-Petitioner established the fact that an irreparable damage would be caused if the interim injunction is not granted? I now advert to this question. The Plaintiff-Petitioner states that the animal waste dumped on the strip of land in front of her house and on the access road by the 2nd Defendant-Respondent emits an unbearable

stench. Needless to say that this kind of stench would cause health problems. People of this country should have the right to inhale unpolluted air and no one is entitled to take away this right and as such no one is permitted to do acts which would emit unbearable stench and smoke (emitting smoke from the ground or closer to the ground) causing disturbance to inhalation of good air. The learned High Court Judges have failed to consider the above facts when they vacated the interim injunction. I must consider if the interim injunction is granted whether it would cause irreparable damage to the Defendant-Respondents. If it is granted the 2nd Defendant-Respondent will have to take steps to find another place to dump the animal waste and also provide parking space for his vehicles, customers' vehicle and suppliers' vehicles. This would not cause an irreparable damage to him. When I consider all the above matters, I hold that an irreparable damage would be caused to the Plaintiff-Petitioner and the people in her neighbourhood if an interim injunction is not issued.

As the interim injunction is granted in the discretion of court, I must consider whether the conduct of parties would justify the grant of the interim injunction prayed for by the Plaintiff-Petitioner. I now advert to this question. The Plaintiff-Petitioner states, in her affidavit, that her access road is obstructed by the vehicle of the 2nd Defendant-Respondent, his suppliers and his customers and that the animal waste dumped by the 2nd Defendant-Respondent emits an unbearable stench causing health hazard to the people. As I pointed out earlier the people should have the right to inhale unpolluted air and no one has the right to deny the said right. For the above reasons, I hold that the conduct of the 2nd Defendant-Respondent would justify the grant of the interim injunction. The learned Judges of the High Court have not considered the above matters and fallen into serious error when they vacated the interim injunction issued by the learned District Judge.

The learned High Court Judges, in the impugned order, have held that the Plaintiff-Petitioner is guilty of laches. Is this correct? I now advert to this question.

The Plaintiff-Petitioner has, on 19.8.2009, made a complaint to the Municipal Council Kotte complaining about the health hazard caused by the 2nd Defendant-Respondent. This letter has been produced with her Plea. The Plaintiff-Petitioner has also made complaints to the police stating the problems that she was facing. These complaints have been made on 3.12.2007, 13.5.2009 and 22.7.2009. It appears from the above facts that she had made continuous attempts to get relief to her problems. Thus how can one say that she was guilty of laches? With due respect to the learned Judges of the High Court, I would like to state here that the Plaintiff-Petitioner was not guilty of laches.

Learned counsel for the 1st Defendant-Respondent contended that the 1st Defendant-Respondent was only the owner of the property in which the 2nd Defendant-Respondent was running a Super Market; that he did not do any of the acts complained of by the Plaintiff-Petitioner; and that therefore the injunction sought by the Plaintiff-Petitioner could not be issued against the 1st Defendant-Respondent. I now advert to this contention. If the court decides to grant the interim injunction against the 2nd Defendant-Respondent and at the same time decides not to grant the interim injunction against the 1st Defendant-Respondent what would happen? In such an event it is possible for the 2nd Defendant-Respondent to continue with the above acts on the basis that he is an agent of the 1st Defendant-Respondent against whom the interim injunction has been refused. If that happens issuing of an interim injunction against the 2nd Defendant-Respondent would be rendered nugatory and there will be no finality in litigation. It is an accepted principle in law that there must be finality in litigation.

Learned counsel for the 2nd Defendant-Respondent contended that the learned District Judge had considered documents marked X1 to X16, produced along with

written submission and that therefore the order of the learned District Judge is wrong. I now advert to this contention. It is true that the learned District Judge had used the above documents when granting the interim injunction. But when I consider the facts of this case, I am of the opinion that the learned District Judge could have arrived at the same conclusion even without considering the said documents. I therefore hold that there is no merit in the above contention.

For the aforementioned reasons, I hold that the learned District Judge was right when he issued the interim injunction against the 1st and the 2nd Defendant-Respondents and the learned Judges of the High Court were wrong when they vacated the said interim injunction. For the above reasons, I set aside the order of the learned Judges of the High Court dated 27.3.2012 and affirm the order of the learned District Judge dated 21.7.2011. In view of the conclusion reached above, I answer the questions of law in favour of the Plaintiff-Petitioner. The Plaintiff-Petitioner is entitled to costs of the action in this court and the costs of the action in courts below. I direct the learned District Judge expeditiously conclude the action filed in the District Court of Nugegoda.

Judge of the Supreme Court

Anil Gonneratne J

I agree.

Judge of the Supreme Court

KT Chitrasiri J

I agree.

Judge of the Supreme Court

